Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-925

EDNA I. BAKER AND ROGER L. BAKER,

PLAINTIFFS-APPELLANTS

v.

OREGON STATE BAR, ALBERT R. MUSICK, HOLGER M. PIHL, CLAIRE TRI, ROBERT BRIGGS, JOHN R. AND JACQUELINE C. SKOURTES, WILLIAM HURLEY, JAMES E. AUXIER, ESTATE OF PAUL M. REEDER, PAUL M. REEDER AND FRANK PORCELLI, JR.,

DEFENDANTS-APPELLEES

APPEAL FROM
THE SUPREME COURT OF THE STATE OF OREGON

MOTION TO DISMISS

[See inside cover for counsel.]

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IN THE SUPREME COURT OF THE UNITED STATES

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v.

OREGON STATE BAR, ALBERT R. MUSICK, HOLGER M. PIHL, CLAIRE TRI, ROBERT BRIGGS, JOHN R. AND JACQUELINE C. SKOURTES, WILLIAM HURLEY, JAMES E. AUXIER, ESTATE OF PAUL M. REEDER, PAUL M. REEDER AND FRANK PORCELLI, JR.,

DEFENDANTS-APPELLEES

APPEAL FROM
THE SUPREME COURT OF THE STATE OF OREGON

MOTION TO DISMISS

Pursuant to Rule 16(1)(a) and (b) of the Rules of the Supreme Court of the United States, defendant-appellee Frank

Porcelli, Jr. by his attorney Ridgway K. Foley, Jr. and defendants-appellees Judge Albert R. Musick, Judge Holger M. Pihl and Claire Tri by their attorney Donald E. Hershiser, and defendant-appellee Oregon State Bar by its attorney Jack L. Kennedy, move the United States Supreme Court to dismiss Plaintiffs Roger L. Baker and Edna I. Baker's appeal from the Supreme Court of the State of Oregon on the following grounds:

1. The appeal is not within the jurisdiction of this court, because it is not taken in conformity to 28 U.S.C. § 1257(2).

2. The appeal does not present a substantial federal question.

3. The federal question sought to be reviewed was neither timely or properly raised nor expressly passed on by the courts of the State of Oregon.

4. The judgment of the Supreme Court of the State of Oregon rests upon an adequate non-federal basis.

STATEMENT

The facts of this case involve three different law suits. Plaintiff Edna Baker originally sued defendant Skourtes in equity as conservator and eventually personal representative of her father's estate to rescind a land sale contract entered into by him on grounds of incompetency. Defendant Skourtes counter-claimed for specific performance of the contract. In Gindhart v. Skourtes, 271 Or. 115, 530 P.2d 827 (1975), the Oregon Supreme Court held that Mr. Gindhart was competent and ordered specific performance of the contract. The Bakers were then living in the house on the property.

The alleged facts upon which plaintiffs are presently suing defendants arise out of the "probate case," Washington County Circuit Court No. E1533. One cannot determine from the seven complaints filed in the third case, the "civil appeal," what defendants allegedly did wrong during the probate proceedings which affected the Gindhart/Skourtes contract.

The factual allegations of the Seventh Amended Complaint, prepared by an attorney, follow. Plaintiffs allege that defendant Paul Reeder failed to advise Mrs. Baker of proper accounting methods and the necessity of keeping a trust checking account separate from personal funds which caused her removal as personal representative of her father's estate (7th Amended Complaint, 1st Cause of Action, paras. III-V). Defendant

Reeder also allegedly placed an attorney's lien against two checks in his posession received from the Skourteses on the land sale contract. He later filed a Summary Determination of his attorney fees and the Washington County Court scheduled a hearing for April 3, 1975 (7th Amended Complaint, 2nd Cause of Action, para. XIII). Plaintiff's attorney at that time, James Auxier, allegedly negotiated a settlement for one-half of the claimed fees, but Mrs. Baker notified Mr. Auxier that she rejected defendant Reeder's claim and fired Mr. Auxier (7th Amended Complaint, 2nd Cause of Action, paras. XIII-XIV). On April 3, 1975, at the hearing, defendant Pihl allegedly ordered Mrs. Baker to obtain counsel to "assist her in the proper handling of the Estate of Fritz G. Gindhart" and notify the court by April 14,

1975 (7th Amended Complaint, 2nd Cause of Action, para. XV, and 5th Cause of Action, para. VIII). Plaintiff allegedly hired Frank Porcelli, Jr. in April, 1975, and allegedly notified the court (7th Amended Complaint, 5th Cause of Action, para. VII). Plaintiff also alleges that Mr. Porcelli informed the court on May 8, 1975 that he did not represent Mrs. Baker (7th Amended Complaint, 5th Cause of Action, para. XV and 7th Cause of Action, para. VII). Defendant Pihl then removed Mrs. Baker as personal representative on July 8, 1975, and appointed defendant Briggs as the successor personal representative (7th Amended Complaint, 5th Cause of Action).

Plaintiff repeatedly alleges that her removal as personal representative caused plaintiff "to lose the right to

prosecute the forfeiture clause of the Gindhart/Skourtes land sales contract to her damage" (7th Amended Complaint, 2nd Cause of Action, para. XX, 3rd, 5th, and 6th Causes of Action). Mrs. Baker alleged that the "contract was in default" because the 1974 payment needed to be reissued and the 1975 payment did not include interest (7th Amended Complaint, 5th Cause of Action, para. XII) and thus subject to the "forfeiture clause". Plaintiff also alleges that defendant Musick issued an order for her arrest for contempt of court allegedly upon petition of the successor personal representative for her refusal to turn over the records of the estate (7th Amended Complaint, 3rd and 4th Causes of Action).

Mr. and Mrs. Baker then brought an action in Multnomah County, Oregon Circuit

Court on August 25, 1977 in which seven amended complaints were eventually filed. The names of the defendants periodically changed as did the causes of action which included fraud, intentional infliction of emotional distress, negligence, malpractice, abuse of process, loss of consortium, conversion, and the like. On January 15, 1979, the court entered a judgment order in favor of defendant Porcelli upon defendant's demurrer; on February 20, 1979, the court entered a judgment order in favor of defendants Musick, Pihl and Tri upon defendants' motion to dismiss; and on November 6, 1977, the court dismissed the action against the Oregon State Bar. Plaintiffs appealed the Multnomah County Circuit Court judgments. Most defendants filed Motions to Dismiss the Appeal upon

a variety of procedural grounds such as failure to timely file the Notice of Appeal and failure to file a sufficient appeal bond. The Court of Appeals dismissed plaintiffs' appeal upon defendants' motions and upon its own motion. On September 5, 1979, the Supreme Court refused to accept plaintiff's Petition for Review. On September 12, 1979, the Supreme Court ruled upon plaintiff's last motions and refused to consolidate the Multnomah County Circuit Court appeal with the Washington County Circuit Court probate case.

Plaintiffs filed two notices of appeal upon both cases to the United States Supreme Court.

QUESTIONS PRESENTED

As stated by plaintiffs, the questions presented by this case are:

1. Whether Impairment of Contract clause is prohibitive of Judicial Legislation in light of Separation of Powers mandate?

2. Whether State officers may deprive plaintiffs of State Constitutional Guarantees in violation of Federal Equal Protection Clause?

ARGUMENT

I. THE APPEAL IS NOT WITHIN THE JURISDICTION OF THIS COURT BECAUSE IT IS NOT TAKEN IN CONFORMITY TO STATUTE.

Plaintiff seeks review pursuant to 28 U.S.C. § 1257(2) which is not a proper remedy for two reasons:

1. Plaintiffs are not drawing into question the validity of a State statute on the ground of it being repugnant to the Constitution, treaties or laws of the United States;

2. The Oregon Supreme Court made no decision in favor of the validity of a challenged State statute. 28 U.S.C. § 1257(2).

First, the only State statutes addressed by plaintiffs are ORS 9.160 and ORS 9.320. ORS 9.320 provides that any action, suit or proceeding may be prosecuted or defended by a party in person, and ORS 9.160 provides that no person shall practice law unless he is an active member of the bar "except for the rights reserved to litigants by ORS 9.320." (See Jurisdictional Statement, p. C-2). Plaintiffs have never urged that these statutes violate the United States Constitution or laws.

The Oregon statutes do not guarantee that a person may continue in his fiduciary position as personal representative without legal counsel when, as plaintiffs allege, he fails to maintain an separate trust account or prepare accountings. The statutes only address the rights of "litigants" to a law suit or a "party" to an "action, suit or proceeding" to appear in person without representation by an attorney.

Plaintiff argues that one possesses a "legislative power" to "represent one's own interest" in court (Jurisdictionsl Statement, p. 7). Once the judicial branch refused to allow Mrs. Baker to proceed as personal representative of her father's estate, it supposedly invaded legislative powers and violated the Separation of Powers mandate (Jurisdictional

Statement, p. 7).[1] Plaintiff does not argue that the statute itself violates the United States Constitution. Plaintiff argues only that the judge's interpretation of ORS 9.160 impaired her father's contract. Since the facts demonstrate the plaintiffs do not challenge the statute itself on grounds of unconstitutionality, this court does not possess jurisdiction on appeal.[2]

Second, contrary to plaintiffs' assertion (Jurisdictional Statement, p. 2), no decision was made by either the trial court, the Court of Appeals, or the Supreme

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[1]The Separation of Powers issue was raised for the first time in the Jurisdictional Statement.

[2]Since plaintiffs do not actually challenge the constitutionality of a state statute, their appeal cannot be treated, in the alternative, as a petition for certiorari. 28 U.S.C. § 2103; 28 U.S.C. § 1257(3).

Court of the State of Oregon in favor of the constitutionality of ORS 9.160 and ORS 9.320. The Oregon appellate ocurts dismissed the appeal upon procedural grounds without ever addressing the validity of the State statutes as did the trial court. The trial court granted defendants' motions based on a variety of grounds, such as failure to state a cause of action, failure to comply with the Statute of Limitations and immunity without ever ruling upon the validity of the State statutes.

The constitutionality of ORS 9.160 and ORS 9.320 was not "actually considered and decided." Charleston Federal Savings & Loan Ass'n v. Alderson, 324 U.S. 182, 185, rehearing denied, 324 U.S. 863 (1945); Harding v. Illinois, 196 U.S. 78 (1904). In Central Land Co. v. Laidley, 159 U.S.

103 (1895), this court dismissed an appeal for want of jurisdiction because:

> "The appellate jurisdiction of this court, upon writ of error to a state court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the legislature alleged to be repugnant to the constitution of the United States has been decided by the state court to be valid, and not when an act admitted to be valid has been misconstrued by the court. The statute of West Virginia is admitted to have been valid, whether it did or did not apply to the deed in question; and it necessarily follows that the question submitted to and decided by the state court was one of construction only, and not of validity. If this court were to assume jurisdiction of this case, the question submitted for its decision would be, not whether the statute was repugnant to the constitution of the United States, but whether the highest court of the state has erred in its construction of the statute."

Plaintiffs do not possess the right to an appeal pursuant to 28 U.S.C. § 1257(2).

II. THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION .

The presence of a federal question is the sine qua non of exercise of appellate jurisdiction by the United States Supreme Court over decisions of state courts. Zucht v. King, 260 U.S. 174, 176 (1922). This case does not present a substantial federal question.

Plaintiffs do not contend that ORS 9.160 or ORS 9.320 are unconstitutional because of some federal constitutional right. Plaintiff claims only that a series of events which allegedly involved interpretation of the statutes resulted in the impairment of a contract when she, in her capacity of personal representative, was required to obtain counsel. Failure to comply with the court's order to obtain an attorney together with other

alleged indiscretions resulted in her removal as personal representative, and the successor personal representative allegedly did not seek foreclosure of a contract as she would have. Mrs. Baker did not possess a "right to enforce the specific terms of the contract." (Jurisdictional Statement, p. 6). Only a properly acting personal representative could enforce the estate's rights. Plaintiffs are not challenging the validity of the statutes themselves. This is not a situation where enactment of a State statute impaired an existing contract.

Even if ORS 9.160 and ORS 9.320 were challenged on grounds of repugnancy to the impairment of contract clause of the United States Constitution, the Constitutional provision governs only State action:

> "No State shall pass * * * any * * * law impairing the Obligation of Contracts, * * *."
> U.S.Const. art. I, § 10.

The purpose of this clause is to limit the legislative power of the State. Central Land Co. v. Laidley, supra, 16 S. Ct. at 82. The constitutional provision prohibits a State from passing a subsequent law which alters, modifies or nullifies existing contracts. United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 17-18, rehearing denied 431 U.S. 975 (1977); Bacon v. Texas, 163 U.S. 207 (1896); Schlothan v. Territory of Alaska, 276 F.2d 806, 814 (9th Cir. 1960), cert. denied 362 U.S. 990 (1960).

Plaintiffs concede that "* * * later rulings seem to disfavor applying the contract impairment clause to a judicial act * * *." (Jurisdictional Statement, p. 6). Barrows v. Jackson, 346 U.S.

249, 260, rehearing denied 346 U.S. 841 (1953); Mariniello v. Shell Oil Co., 511 F.2d 853 (3rd Cir. 1975). The contract impairment clause does not reach construction of a statute by a judge. The constitutional provision also does not apply to individual conduct such as that of Mr. Porcelli and Ms. Tri. Poirier v. Hodges, 445 F.Supp. 838, 842 (D. Fla. 1978).

III. THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NEITHER TIMELY NOR PROPERLY RAISED, NOR EXPRESSLY PASSED ON BY OREGON COURTS.

A. Not Timely or Properly Raised.

The only theory previously raised by plaintiffs is the impairment of contract clause. U.S.Const. art. 1, § 10. Plain-

tiffs did not preserve this issue throughout the proceedings, however. Plaintiffs did not rely upon the United States Constitution art. 1, § 10 in the Seventh Amended Complaint upon which the trial court entered judgment and from which plaintiffs appealed.

Plaintiffs have never previously raised the question of whether the Separation of Powers mandate, the Equal Protection clause or 42 U.S.C. § 1983 were violated by any of defendants' alleged acts. Monks v. New Jersey, 398 U.S. 71 (1970).

In addition, the federal questions sought to be raised by plaintiff were not expressly passed upon by the Oregon courts. None of the courts either discussed or upheld the constitutionality of an Oregon statute.

The Oregon Court of Appeals granted defendants' motions to dismiss based upon procedural grounds. Defendant Porcelli moved to dismiss the appeal because it was not filed within the thirty-day statutory period after judgment was entered in his favor. ORS 18.125; ORS 19.026. Judgment was entered as to defendant Porcelli on January 15, 1979, and plaintiffs filed their notice of appeal on March 22, 1979 (see Porcelli's Motion to Dismiss Appeal and Memorandum filed March 30, 1979). Plaintiffs responded that they never intended to include defendant Porcelli in the appeal:

> "1. It is statutory to provide Notice of Appeal to all partys (sic) who have been involved in an action, regardless of the appealability of any specific order. Since plaintiffs had not submitted any order on appeal concerning defendant Porcelli, attorney

> Reeves' motion is patently frivolous." (Response to Motion to Dismiss served April 2, 1979).

Plaintiffs also objected to defendant Porcelli's cost bill upon the same ground:

> "Plaintiffs' Notice of Appeal did not assign any order dismissing defendant Porcelli. The fact that defendant Porcelli had been included within the notice was to fulfill the statutory requirements for notice of appeal." (Appellant's Objections to Defendant Porcelli's Cost Bill served May 24, 1979).

Thus, defendant Porcelli evidently was never considered to be a party to the appeal before the Oregon courts and should not be a party to this United States Supreme Court appeal. Rule 10(4) of the Rules of the Supreme Court of the United States.

Defendants Pihl, Musick and Tri as well as defendants Briggs, and Oregon State Bar moved to dismiss the appeal because plaintiffs filed an insufficient

appeal bond. ORS 19.038, 19.040, 19.045. Rather than filing an open-ended surety bond, plaintiffs deposited $415.60 in court. The court of appeals allowed the motions to dismiss and, on its own motion, ordered dismissal as to the other defendants (Jurisdictional Statement, p. A-2). The Court of Appeals thus never expressly passed upon the constitutionality of any State statute.

The Oregon Supreme Court's jurisdiction is now discretionary and it denied review. ORS 2.516; ORS 2.520; Rule 10.15 of the Supreme Court and Court of Appeals of the State of Oregon Rules of Appellate Procedure (1979). The highest court of the State thus never expressly passed upon any federal question. The federal question was not presented to the State

courts in such manner that it was necessarily decided by the highest State court. In Newman v. Gates, 204 U.S. 89 (1907), this court held that no decision of a federal question had been reached when the highest court of the state dismissed the appeal because of a defect of parties on appeal. In Fuller v. Oregon, 417 U.S. 40 (1974), this court refused to review due process claims concerning Oregon's recoupment statute which were not raised in the State court and were not discussed by the Oregon Court of Appeals. The Supreme Court should similarly decline review in this case.

IV. JUDGMENT RESTS UPON AN ADEQUATE NON-FEDERAL BASIS.

As outlined above, the decision of the Court of Appeals rests upon plaintiffs'

failure to comply with State procedural statutes regarding appeals. In Michigan v. Tyler, 436 U.S. 499 (1978), this court held that failure to present a federal question in conformance with State procedure constitutes adequate and independent grounds barring review in the United States Supreme Court, so long as the State possesses a legitimate interest in enforcing its procedural rule. See also Johnson v. New Jersey, 384 U.S. 719, 735-736, rehearing denied 385 U.S. 890 (1966); Wainwright v. Sykes, 433 U.S. 72, 86-87, rehearing denied 434 U.S. 880 (1977). Compliance with appellate procedural rules serves a legitimate state interest.

In addition, the judgment of the trial court rests upon adequate non-federal grounds. The trial court entered judgment

upon defendant Porcelli's demurrer for failure to state a cause of action and failure to comply with the statute of limitations. ORS 16.260; ORS 12.110. Plaintiffs attempted to state a cause of action for fraud and misrepresentation against Mr. Porcelli (7th Amended Complaint, 7th Cause of Action). See, e.g., Preston v. Chicago, 226 U.S. 447 (1913); Johnson v. Risk, 137 U.S. 300 (1890). The trial court entered judgment upon defendants Pihl, Musick and Tri's Motion to Dismiss on grounds of immunity, lack of tort claims notice and failure to state a cause of action. ORS 16.260; ORS 30.275; Smith v. Smith, 396 F. Supp. 367, Aff'd 519 F.2d 1376 (D. Or. 1973); Clifton v. Hawkins, 218 Or. 368, 345 P.2d 255 (1959); Utley v. City of Independence, 240 Or. 384, 386, 402 P.2d 91 (1965). Plaintiffs

attempted to plead abuse of process, intentional infliction of emotional distress, false imprisonment and misrepresentation against the judges (7th Amended Complaint, 3rd - 6th Causes of Action). Plaintiffs alleged that the Oregon State Bar, by failing to "prosecute" Judges Pihl and Musick for perjury, had joined in the "scheme" to interfere with plaintiffs' and the estate's contract rights. The trial court dismissed the action against the Oregon State Bar upon state grounds, although final judgment was never entered. The court's decisions rest upon independent and adequate state grounds, both procedural and substantive.

Plaintiff argues that his second federal question is whether the state courts must provide recourse as mandated by the Ore. Const. art. I, § 10 and must

provide jury trials as mandated by Ore. Const. art. I, § 17. If the Oregon appellate courts had made any decision regarding these issues which are raised for the first time upon appeal to the United States Supreme Court, their decision would have rested upon adequate state grounds. Plaintiff relies upon only the Oregon State Constitution for his jury trial and remedy arguments (Jursidictional Statement, p. 8).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the appeal should be dismissed.

DATED this _____ day of January, 1980.

Respectfully submitted,

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